

APPEAL NO. 020618
FILED MAY 7, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 28, 2002. The hearing officer resolved the disputed issues before her by determining that the respondent's (claimant) date of injury, pursuant to Section 408.007, the date the claimant knew or should have known that the disease may be related to her employment, was _____; that the claimant sustained a compensable injury in the form of an occupational disease; that the appellant (carrier) is not relieved of liability under Section 409.002; that, although the claimant failed to timely notify her employer, the employer had actual knowledge of the injury within the 30 days following _____; and that the claimant had disability, beginning October 3, 2001, and continuing. The carrier appealed on sufficiency grounds. The file contains no response from the claimant.

DECISION

Affirmed in part, reversed and rendered in part.

The facts of this case are largely undisputed. The claimant testified that she was employed as a delivery driver and that her position involved a lot of lifting and carrying of automotive supplies. The claimant testified that she began to experience back pain, which she attributed to her employment, on or about _____; that her manager and the other employees were aware that she was experiencing back pain, and in fact helped her with the heavy lifting; that she continued working and self-treating her pain until October 2, 2001, when the pain became unbearable and she went to the hospital; that she was taken off work that day; that she did not report a work-related injury until October 9, 2001, because she did not want to complain; and that she has not returned to work since that day. The claimant's manager testified that the claimant reported a work-related injury to him on October 9, 2001; that prior to October, the claimant never reported an on-the-job injury; and that he was unaware that she had injured herself on the job prior to October 2001. He further testified that everybody's back bothers them in that job and complaints of back pain were a normal occurrence.

The hearing officer did not err in determining that the claimant's date of injury, pursuant to Section 408.007, was _____. Section 401.011(34) defines occupational disease as including repetitive trauma injuries. The date of injury for an occupational disease is the date the employee knew or should have known that the disease may be related to the employment. Section 408.007. Determination of the date of injury is generally a question of fact for the hearing officer to resolve. It was the hearing officer's prerogative to believe all, part, or none of the testimony of any witness, including that of the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The hearing officer's determination that the claimant's date of injury was _____, is supported by the evidence and we will not disturb that determination on appeal.

The hearing officer erred in determining that the carrier is not relieved of liability under Section 409.002, because, although the claimant failed to timely notify her employer, the employer had actual knowledge of the injury within the 30 days following _____. The 1989 Act generally requires that an injured employee or person acting on the employee's behalf notify the employer of the injury not later than 30 days after the injury has occurred. Section 409.001. The 1989 Act provides that a determination by the Texas Workers' Compensation Commission that good cause exists for failure to provide notice of injury to an employer in a timely manner, or actual knowledge of the injury by the employer, can relieve the claimant of the requirement to timely report the injury. Section 409.002. The burden is on the claimant to prove the existence of notice of injury. Travelers Insurance Company v. Miller, 390 S.W.2d 284 (Tex. Civ. App.-El Paso 1965, no writ). To be effective, notice of injury needs to inform the employer of the general nature of the injury and the fact that it is job related. DeAnda v. Home Ins. Co., 618 S.W.2d 529, 533 (Tex. 1980). Thus, where the employer knew of a physical problem, but was not informed that it was job related, there was not notice of injury. Texas Employers' Insurance Association v. Mathes, 771 S.W.2d 225 (Tex. App.-El Paso 1989, writ denied). Also, the actual knowledge exception requires actual knowledge of a work-related injury. Fairchild v. Insurance Company of North America, 610 S.W.2d 217, 220 (Tex. Civ. App.-Houston [1st Dist.] 1980, no writ). The burden is on the claimant to prove actual knowledge. Miller v. Texas Employers' Insurance Association, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.).

In the instant case, the employer's manager had actual knowledge that the claimant was experiencing back pain, however, he testified that this was normal for the type of work being performed. Because there is no evidence that the employer had actual knowledge of a work-related injury between _____, and October 9, 2001, the hearing officer's determination that the employer had actual knowledge of the claimed injury within 30 days of _____, is so against the great weight and preponderance of the evidence as to be manifestly unjust. We reverse the hearing officer's determination that the employer had actual knowledge of the injury within 30 days of _____, and render a decision that the carrier is relieved of liability under Section 409.002 because the claimant failed to timely notify her employer of a work-related injury within 30 days following _____, and that the employer did not have actual knowledge of the claimant's work-related injury within 30 days following _____.

Because we have determined that the carrier is relieved of liability under Section 409.002, we likewise reverse the hearing officer's determination that the claimant sustained a compensable injury and had disability; by definition, the existence of a compensable injury is a prerequisite to a finding of disability. Section 401.011(16).

The hearing officer's determination that the claimant's date of injury is _____, is affirmed. The hearing officer's decision that the claimant sustained a compensable injury in the form of an occupational disease; that the carrier is not relieved of liability under Section 409.002; that the employer had actual knowledge of the work-related injury within the 30 days following _____; and that the claimant had

disability, beginning October 3, 2001, and continuing is reversed and a new decision is rendered that the claimant did not sustain a compensable injury in the form of an occupational disease; that the carrier is relieved of liability under Section 409.002 because the claimant did not timely notify her employer of a work-related injury within 30 days of _____, pursuant to Section 409.001 and did not have good cause for failing to do so; that the employer did not have actual knowledge of the work-related injury within 30 days of _____; and that the claimant did not have disability beginning October 3, 2001, and continuing.

The true corporate name of the insurance carrier is **LUMBERMENS MUTUAL CASUALTY COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.**

Daniel R. Barry
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Philip F. O'Neill
Appeals Judge